

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

SEAN WIEDNER,

Plaintiff,

vs.

LARRY D. WILSON, JR.,
GEORGE MORTEO,
CITY OF GUTTENBERG, IOWA,

Defendants.

No. C04-1029

ORDER

This matter comes before the court pursuant to Defendant Larry D. Wilson, Jr.'s November 11, 2004 motion to dismiss (docket number 11). The parties have consented to the exercise of jurisdiction by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). The motion to dismiss is denied.

The plaintiff in this case, Sean Wiedner, served notice of process to Defendant Larry D. Wilson Jr. by serving Defendant Wilson's mother at her residence in Colesburg, Iowa.¹ The defendant brings this motion to dismiss based on improper service, contending that (1) he "has not and does not make his mother's address his dwelling house or place of abode"; and (2) because he is serving in the military and currently stationed in Iraq, he is "unable to defend himself in this lawsuit and therefore, requiring him to defend this lawsuit, in absentia, violates his due process rights." The plaintiff argues that (1) the defendant's position that [his mother's address in Colesburg, Iowa] was not his dwelling house or usual place of abode "is unsupported by way of affidavit or other evidence"; (2) the defendant's "induction into military service, without more, does not change his

¹ Defendant Wilson is one of three defendants in this lawsuit. The other defendants are George Morteo and the City of Guttenberg, Iowa.

usual place of abode” for purposes of providing service; (3) pursuant to the Iowa Supreme Court decision in Ruth & Clark, Inc. v. Emery, 11 N.W.2d 397 (Iowa 1943), absent proof that a serviceman has left his civilian residence with the requisite intent to change his domicile, the defendant’s last civilian residence should be deemed to remain his abode or residence for purposes of providing service; (4) Federal Rule of Civil Procedure 4(e) is to be “liberally construed in the interest of doing substantial justice” by the court in recognition of the principle that service of process is “primarily a notice-giving device”; and (5) upon a proper showing, the defendant would “in all likelihood be entitled to a stay of the proceedings pursuant to the Soldiers’ and Sailors’ Relief Act” and not be required to defend the lawsuit in absentia.

The plaintiff has provided the affidavit testimony of Keri Wiedner, co-worker of Defendant Wilson’s spouse Allysa, which states in relevant part:

Allysa and I have been co-workers for the last five years. We see each other on a daily basis and regularly talk. . . . [B]oth Allysa and [the defendant] moved in with [the defendant’s] mother at her residence located at 417 Main Street, Colesburg, Delaware County, Iowa. This would have been sometime in the spring of 2003. They have continued to reside at the Colesburg address on a regular basis since that time with the exception of a three month period when both Allysa and Larry went to Texas. . . . At the end of [the defendant’s] training period both [the defendant] and Allysa returned to [the defendant’s] mother’s home in Colesburg, Allysa returned to work at the Guttenberg Care Center and they continued to make their residence at 417 Main Street, Colesburg, Iowa. When talking with Allysa she refers to [the defendant’s] mother’s residence as their home. Although [the defendant] is now in the military, Allysa continues to reside at the residence. . . . I also know that when [the defendant] was home on leave from the military . . . he resided at the 417 Main Street address in Colesburg, Iowa. . . .

Conclusions of Law

Fed. R. Civ. P. 4(e) provides in relevant part:

service upon an individual . . . other than an infant or an incompetent person, may be effected in any judicial district of the United States . . . (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. . . .

Fed. R. Civ. P. 4(e)(2) (2004). In determining whether a party has complied with this substituted service of process provision, “each case must turn upon its own factual situation.” Hron v. Ryan, 164 N.W.2d 815, 818 (Iowa 1969). When an individual is inducted into military service, there is a presumption that he retains his “dwelling house or usual place of abode,” which presumption may be rebutted by evidence, such as affidavit testimony, that shows contrary intent. See Hron, *supra*, at 818. Induction into military service, without more, does not change an individual's usual place of abode. Hron, *supra*, at 818. “[A]bsent proof that [a] servicemember left his or her civilian residence with the intent requisite to a change of domicile, the civilian residence remain[s] his or her ‘abode’ or ‘residence’ and valid service may be had there.” See Ruth & Clark, Inc. v. Emery, 11 N.W.2d 397 (Iowa 1943) (internal citations omitted).²

The court finds that service to the defendant's residence at 417 Main Street, Colesburg, Iowa was sufficient service of process under Fed. R. Civ. P. 4. The defendant has set forth no testimony or evidence in support of his contention that his mother's address is not his “dwelling house or usual place of abode” for purposes of service under Fed. R. Civ. P. 4. Although the defendant states in his motion to dismiss that he “intends

²The Iowa Supreme Court, in Hron v. Ryan, noted that Ruth & Clark, Inc. v. Emery was decided based upon a statute that was in effect prior to the state's adoption of Iowa Rule of Civil Procedure 56(a), and therefore may no longer be applicable to the analysis of service in subsequent cases.

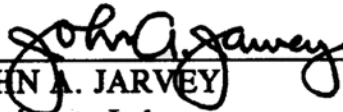
to make the military his career,” he does not indicate how such an intention necessarily indicates that his last place of civilian residence and his spouse’s current place of residence is no longer his domicile. Further, the only sworn testimony of record, the affidavit of Ms. Wiedner, indicates that the defendant and his wife have lived at his mother’s residence since sometime in the Spring of 2003, that his wife continues to live there and refers to it as she and the defendant’s residence, and that the defendant has at least once returned to the residence to stay while on leave from military duty.

For the reasons discussed above,

IT IS ORDERED

Defendant Larry D. Wilson, Jr.’s November 11, 2004, motion to dismiss (docket number 11) is denied.

January 11, 2005.



JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT